

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**February 19, 2013**

Diane M. Fremgen  
Clerk of Court of Appeals

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**Appeal No. 2012AP1656**

**Cir. Ct. No. 2011CV149**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT III**

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**ZAUG ENTERPRISES, LIMITED PARTNERSHIP,**

**PLAINTIFF-APPELLANT,**

**V.**

**VILLAGE OF SISTER BAY, WI,**

**DEFENDANT-RESPONDENT.**

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APPEAL from a judgment of the circuit court for Door County:  
D. T. EHLERS, Judge. *Affirmed in part; reversed in part and cause remanded with directions.*

Before Hoover, P.J., Mangerson, J., and Thomas Cane, Reserve  
Judge.

¶1 CANE, J. Zaug Enterprises, Limited Partnership, appeals a  
judgment dismissing its excessive assessment claim against the Village of Sister

Bay. Zaug argues that the Village's assessor failed to apply the principles set forth in the WISCONSIN PROPERTY ASSESSMENT MANUAL, and, as a result, the assessment was not entitled to a presumption of correctness. Zaug also contends that, because its appraiser complied with the property assessment manual, the circuit court should have accepted Zaug's valuation and entered judgment refunding a portion of Zaug's 2010 real estate taxes.

¶2 We agree with Zaug that the Village's assessor failed to comply with the property assessment manual because he valued Zaug's property without considering the income approach to valuation. Consequently, the assessment was not entitled to a presumption of correctness. However, we reject Zaug's argument that the circuit court should have accepted the valuation suggested by Zaug's appraiser. The court determined Zaug's valuation was not credible, and we defer to the court's credibility determinations.

¶3 We therefore affirm that portion of the judgment declining to accept the valuation set forth by Zaug's appraiser, but we reverse the judgment to the extent it accepted the Village's valuation and dismissed Zaug's claim. Because the record does not permit the amount of unlawful taxes, if any, to be determined with "reasonable certainty[.]" *see* WIS. STAT. § 74.39(3), we remand with directions that the circuit court "continue the action to permit reassessment of the property[.]" *see* WIS. STAT. § 74.39(1).<sup>1</sup>

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<sup>1</sup> All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

## BACKGROUND

¶4 Zaug owns and operates the Country House Resort, a forty-six-room hotel located in the Village of Sister Bay. Zaug purchased the resort in 1989 for \$1,800,000 and subsequently acquired neighboring properties for \$1,605,000. At present, the property comprises a sixteen-acre parcel with 782.7 feet of shoreline on Green Bay. Over the years, Zaug has spent \$591,939 to construct additional improvements on the property.

¶5 In 2010, the Country House property was assessed at \$6,611,500, which included \$5,087,500 for the land and \$1,524,000 for the improvements. Zaug paid its 2010 real estate taxes under protest and filed a claim for excessive assessment with the village board, pursuant to WIS. STAT. § 74.37(2)(a). After the Village disallowed Zaug's claim, Zaug filed the instant lawsuit under WIS. STAT. § 74.37(3)(d). Zaug's complaint alleged that the Village's assessment exceeded the property's fair market value by \$2,351,500, and, as a result, Zaug overpaid its 2010 property taxes by \$27,603.09.

¶6 A trial to the court was held on January 18, 2012. The Village's assessor, Michael Walker, testified he assessed the Country House property in 2010. To determine the property's value, Walker first calculated the value of the land itself. To do so, he relied on data he collected during a village-wide revaluation that he completed in 2008. Specifically, he relied on Exhibit 6, a map that illustrated seventeen sales of shoreline property in the Village and a neighboring town between October 2000 and July 2008. Exhibit 6 gave the "indicated shoreland value" for each sale—that is, the price per foot of shoreline. The indicated shoreland values listed on Exhibit 6 ranged from \$4,598 per foot to \$13,141 per foot. Based on this data, Walker determined the shoreline value of

the Country House property was \$6,500 per foot, which resulted in a total land value of \$5,087,500.

¶7 Walker then determined the value of the property's improvements. To do so, he calculated the cost to rebuild the improvements, then reduced that number to account for depreciation. Using this method, he valued the property's improvements at \$1,524,000. By adding this figure to the land value, Walker concluded the total value of the Country House property was \$6,611,500.

¶8 We pause here to note that the WISCONSIN PROPERTY ASSESSMENT MANUAL sets forth three approaches to valuing property: the sales comparison approach, the cost approach, and the income approach. *See* WISCONSIN PROPERTY ASSESSMENT MANUAL 7-23 (2013).<sup>2</sup> Under the sales comparison approach, the assessor “relies on recent market sales of similar properties to predict the probable market price of the subject [property].” *Id.* Under the cost approach, the assessor: (1) estimates the land value for the subject property; (2) estimates the cost to reproduce or replace the improvements on the subject property, then subtracts accrued depreciation to calculate the improvements' present value; and (3) adds the improvements' present value to the estimated land value to come up with a total property value. *Id.* at 7-31. Under the last approach to value—the income approach—the assessor calculates the property's current value based on its income-generating potential. *Id.* at 9-14.

¶9 Walker testified that, when assessing the Country House property, he used the sales comparison approach to value the land and the cost approach to

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<sup>2</sup> All references to the WISCONSIN PROPERTY ASSESSMENT MANUAL are to the 2013 version, which is available at <http://www.revenue.wi.gov/slf/wpam/wpam.pdf>.

value the improvements, but he did not use the income approach. When asked why he failed to use the income approach, Walker explained:

Being an assessor at the end of this year for almost 40 years, it's my judgment not to use income analysis approach even though in some cases it's recommended in the property assessment manual because being the assessor is a[n] adversarial relationship to property owners most of the time. Based on assessments, they pay taxes. People want to pay as little taxes as they can, so as a result, somebody that runs up to show me their income that I should use this or that capitalization rate to document in terms of an estimate of value usually has bad news for me. Conversely, if I would use income when they have a bad year, I don't—I've never in my 40 years found anyone coming up to me when they've had a good year and saying, "Gee, will you raise my assessment because I've had one or more good years in a row?"

I think that's where there's a little bit of disagreement between the people who write the property assessment manual, which are typically bureaucrats, and those of us who have made our living by going out and knocking on doors, talking to people and being on site to make on premise decisions.

Therefore, the second reason that I don't use the income approach to value is that I am not—I do not have any powers of discernment in terms of whether or not a particular income statement would be true or not.

¶10 On cross-examination, Walker conceded that Zaug provided him with income information for the Country House, but Walker declined to use that information in valuing the property. Walker also conceded the WISCONSIN PROPERTY ASSESSMENT MANUAL states that the income approach “may frequently be the most reliable method for estimating the value of commercial property because it represents the way investors think when they buy and sell income property in the market.” See WISCONSIN PROPERTY ASSESSMENT MANUAL 9-14. However, Walker stated he disagrees with the manual on this issue, and he noted the manual also states it is sometimes difficult to use the

income approach when valuing hotels because their income “is substantially affected by the quality of management.” *See* WISCONSIN PROPERTY ASSESSMENT MANUAL 9-43. Walker admitted there are ways of determining the extent to which the quality of management affects a hotel’s income, but he testified “they are very time consuming.”

¶11 The court also heard testimony from Peter Moegenburg, a licensed real estate appraiser. Moegenburg testified that Zaug hired him to appraise the Country House property in 2010. He valued the property using both the sales comparison approach and the income approach. Moegenburg testified he considered using the cost approach, and he actually completed a land valuation as part of that approach, but he ultimately determined the cost approach was inappropriate due to “the age of the asset” and “the change in construction methodology between the multiple phases.” He stated that, ultimately, the sales comparison approach provided the “primary indicator of value.”

¶12 Under the sales comparison approach, Moegenburg considered the sales of six other Door County hotels between 2004 and 2008. Based on these sales, Moegenburg determined that the average market value for a Door County hotel was \$60,000 per room. Because the Country House has forty-six rooms, Moegenburg arrived at a value of \$2,760,000 for the hotel itself and the land immediately surrounding it. Moegenburg valued the remainder of the property, which he termed “excess land,” at \$1,500,000. By adding these two figures, he determined the total value of the Country House property was \$4,260,000. On cross-examination, Moegenburg admitted that, of the six hotels used in his sales comparison analysis, only one was a waterfront property. Moreover, unlike the Country House, that hotel was separated from the water by a state highway.

¶13 Using the income approach, Moegenburg determined the Country House resort and the land immediately surrounding it were worth \$2,800,000. Again, he added \$1,500,000 to this amount to account for the value of the “excess land.” Thus, the income approach produced a total valuation of \$4,300,000. Moegenburg ultimately valued the property at \$4,260,000, the value produced by the sales comparison approach.

¶14 Both parties submitted posttrial briefs. Zaug argued that Walker failed to comply with the WISCONSIN PROPERTY ASSESSMENT MANUAL when he refused to value the Country House property using the income approach. Accordingly, Zaug contended Walker’s assessment was not entitled to a presumption of correctness. In response, the Village asserted that Walker properly considered the income approach but rejected it as inappropriate under the circumstances. The Village also argued that Moegenburg’s appraisal was unreliable because it was based on sales of properties that were not truly comparable to the Country House.

¶15 The circuit court agreed with the Village. In a written decision, the court concluded that Walker considered the income approach, but he properly rejected it because he finds it “unreliable” and “would have concerns regarding property owners providing inaccurate or slanted information and records.” The court also determined that Moegenburg’s appraisal was based on unreliable information, and consequently, was not credible. The court concluded Walker’s assessment was entitled to a presumption of correctness because it was made according to law and because Zaug failed to present “significant contrary evidence.” The court therefore entered judgment dismissing Zaug’s excessive assessment claim.

## DISCUSSION

¶16 At the outset, we note that this case involves an excessive assessment claim under WIS. STAT. § 74.37(3)(d). “This is not a certiorari review.” *Bloomer Housing Ltd. P’ship v. City of Bloomer*, 2002 WI App 252, ¶11, 257 Wis.2d 883, 653 N.W.2d 309. Consequently, when considering an excessive assessment claim, the circuit court need not defer to any determination made at a previous proceeding before the board of review. *Allright Props., Inc. v. City of Milwaukee*, 2009 WI App 46, ¶12, 317 Wis.2d 228, 767 N.W.2d 567. Instead, the court must accord the assessor’s assessment a presumption of correctness. *Id.* The presumption of correctness does not apply, though, if the challenging party presents “significant contrary evidence[,]” or shows that the assessment “does not apply the principles in the [WISCONSIN PROPERTY ASSESSMENT MANUAL].” *Adams Outdoor Adver., Ltd. v. City of Madison*, 2006 WI 104, ¶¶25, 56, 294 Wis.2d 441, 717 N.W.2d 803.

¶17 On appeal, we defer to the circuit court’s findings of fact. *Allright Props.*, 317 Wis.2d 228, ¶13. We will not upset the court’s factual findings, including findings involving the credibility of witnesses, unless they are clearly erroneous. *See* WIS. STAT. § 805.17(2); *Lessor v. Wangelin*, 221 Wis.2d 659, 665-66, 586 N.W.2d 1 (Ct. App. 1998). In particular, it is within the province of the fact finder to determine the weight and credibility of expert witnesses’ opinions. *Bloomer Housing*, 257 Wis.2d 883, ¶12. Conversely, application of the law to the facts presents a question of law subject to de novo review. *Allright Props.*, 317 Wis.2d 228, ¶13. Thus, we independently review whether an assessor complied with the statutes and the WISCONSIN PROPERTY ASSESSMENT MANUAL. *See id.*



¶18 As previously explained, the WISCONSIN PROPERTY ASSESSMENT MANUAL sets forth three approaches to valuation: the sales comparison approach, the cost approach, and the income approach. *See supra*, ¶8. The manual states that an assessor “should *consider* all three approaches when estimating the value of a property.” WISCONSIN PROPERTY ASSESSMENT MANUAL 9-38. However, although the assessor must consider each approach, “all three approaches may not be developed in an appraisal because a sufficient amount of data may not be available or, due to the specific property characteristics, the approach may be considered less reliable in estimating market value.”<sup>3</sup> *Id.* According to the manual, the income approach is “usually the best method for estimating the value of commercial property” because it “represents the way investors think when they buy and sell income property in the market.” *Id.* at 9-14.

¶19 The parties agree that, under these standards, Walker was required to “consider” the income approach when estimating the value of Zaug’s property.

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<sup>3</sup> We note that, while the manual states that an assessor should consider the sales comparison, cost, and income approaches in every case, case law prescribes a three-tier methodology for determining a property’s value. *See Allright Props., Inc. v. City of Milwaukee*, 2009 WI App 46, ¶11, 317 Wis. 2d 228, 767 N.W.2d 567. “The best evidence of fair market value—known as Tier 1—is a ‘recent arm’s length sale[] of the property.’” *Id.*, ¶21 (quoting WIS. STAT. § 70.32(1)). If no such sale exists, the assessor proceeds to Tier 2 and applies the sales comparison approach. *See id.*, ¶22. Finally, if there are no reasonably comparable sales, the assessor may use “any of the third-tier assessment methodologies[,]” which include the income approach and the cost approach. *Adams Outdoor Adver., Ltd. v. City of Madison*, 2006 WI 104, ¶¶34-35, 294 Wis. 2d 441, 717 N.W.2d 803.

It is error to use one of the third-tier assessment methodologies when a property’s value can be determined using the sales comparison approach. *See id.*, ¶37. Thus, while the manual instructs assessors to consider all three approaches, the assessor should not base his or her valuation on the cost or income approaches if sufficient data is available to use the sales comparison approach. Notably, in this case, Walker and Moegenburg each testified to using both the sales comparison approach and one of the third-tier methodologies.

Their dispute centers on whether Walker actually did so. We agree with Zaug that Walker did not consider the income approach.

¶20 It is undisputed that Walker did not develop a valuation of the Country House property using the income approach. When asked at trial about his failure to do so, Walker simply stated he “do[esn’t] use the income approach” when making assessments. To justify this blanket refusal, Walker stated he is incapable of discerning the accuracy of the income data he receives from property owners. In addition, he intimated he does not trust property owners to provide him with reliable information.

¶21 Walker’s testimony reveals that, as a rule, he simply refuses to apply the income approach when valuing properties. He did not testify that any specific facet of this case would have made using the income approach inappropriate. For instance, he did not testify that he lacked sufficient data to complete an income analysis. *See* WISCONSIN PROPERTY ASSESSMENT MANUAL 9-38 (assessor need not develop income approach if he or she lacks sufficient data to do so). In fact, he testified that Zaug provided him with data, but he declined to use it. Moreover, while Walker insinuated that income data from property owners is inherently unreliable, he conceded that he has a good relationship with Zaug, and he stated, “I’ve always thought [Zaug has] told me the truth.” Thus, the record shows that Walker had no specific reason to mistrust Zaug or discount the information Zaug provided.

¶22 Additionally, Walker did not testify that any specific characteristics of the Country House property would have made use of the income approach unreliable. *See id.* (assessor need not develop income approach if “specific property characteristics” render the approach unreliable). Instead, he testified the

income approach is unreliable as a general rule.<sup>4</sup> Walker did point out that the WISCONSIN PROPERTY ASSESSMENT MANUAL states it is sometimes difficult to use the income approach when valuing hotels and motels because their income “is substantially affected by the quality of management.” *See id.* at 9-43. However, as Walker conceded, there are techniques that allow an assessor to account for the quality of a hotel’s management. Although these techniques may be “time consuming,” nothing in the manual allows an assessor to disregard the income approach simply because the assessor does not want to spend the time required to develop that approach.

¶23 On these facts, we conclude Walker did not “consider” the income approach when valuing the Country House property. Instead, he rejected the income approach out of hand based on his own blanket rule that it never produces reliable results. Because the WISCONSIN PROPERTY ASSESSMENT MANUAL mandates consideration of each approach to value, and because Walker failed to consider the income approach, Walker’s assessment of the Country House property did not comply with the manual. *Cf. Adams Outdoor Adver.*, 294 Wis. 2d 441, ¶55 (holding that assessor erred by rejecting cost approach “out of hand” because he deemed it unreliable). Consequently, Walker’s assessment is not entitled to a presumption of correctness.<sup>5</sup> *See id.*, ¶56.

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<sup>4</sup> The authors of the WISCONSIN PROPERTY ASSESSMENT MANUAL clearly disagree, as they state that the income method is “usually the best method” of valuing commercial property. *See* WISCONSIN PROPERTY ASSESSMENT MANUAL 9-14.

<sup>5</sup> Zaug challenges Walker’s assessment on several other grounds. Because we conclude Walker’s assessment is not entitled to a presumption of correctness due to his failure to consider the income approach, we need not address Zaug’s other arguments. *See State v. Castillo*, 213 Wis. 2d 488, 492, 570 N.W.2d 44 (1997) (appellate courts not required to address every issue raised when one issue is dispositive).

¶24 As a result, Zaug argues we should remand this case to the circuit court with directions to adopt Moegenburg's valuation and "enter judgment on behalf of [Zaug] accordingly." However, in an excessive assessment action under WIS. STAT. § 74.37(3), if the court determines an assessment is invalid, the default remedy is for the court to "continue the action to permit reassessment of the property." *See* WIS. STAT. § 74.39(1). The court may proceed to judgment without ordering a reassessment only if: (1) doing so is in the parties' best interests; and (2) the court is "able to determine the amount of unlawful taxes with reasonable certainty." WIS. STAT. § 74.39(3).

¶25 Here, the amount of unlawful taxes cannot be determined with reasonable certainty based on Moegenburg's valuation. The circuit court determined Moegenburg's valuation was not credible. Specifically, the court determined Moegenburg's sales comparison analysis was based on "unreliable information" because the sales Moegenburg considered were not truly comparable. The court noted that Moegenburg considered "non-waterfront, inland properties," whereas the Country House is a "spectacular and unique" waterfront hotel. The court also noted that Zaug began acquiring the Country House property in 1989 and invested a total of \$3,996,939 in the property. Thus, accepting Moegenburg's appraisal would require the court to conclude that "[t]his property with over 780 feet of shoreline frontage has only risen in value by \$300,000 over 23 years[.]" According to the court, "[t]hat defies common sense and reality." Finally, the court pointed out that, before hiring Moegenburg, Zaug received another appraiser's opinion that "the assessed value for the property should not exceed ... \$5,087,500." The court noted, "That appraisal does not per se justify a \$6.6 million dollar assessment ... but it does call into question the reliability of Mr. Moegenburg's \$4.2 million dollar valuation."

¶26 The circuit court's finding that Moegenburg's valuation was not credible is based on the evidence and is not clearly erroneous. We therefore defer to the court's finding. *See Lessor*, 221 Wis.2d at 665-66. Consequently, Moegenburg's appraisal does not allow us to determine with reasonable certainty the amount of unlawful taxes that Zaug paid. We therefore remand with directions that the circuit court continue the action to permit reassessment of the property. *See* WIS. STAT. § 74.39(1).

¶27 Neither party shall receive appellate costs. *See* WIS. STAT. RULE 809.25(1).

*By the Court.*—Judgment affirmed in part; reversed in part and cause remanded with directions.

Not recommended for publication in the official reports.

